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10 NATIONAL RAILROAD PASSENGER
11 CORPORATION dba AMTRAK and JOE DEELY

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

11 JOHN EARL CAMPBELL,

12 Plaintiff,

13 v.

14 NATIONAL RAILROAD PASSENGER
15 CORPORATION dba AMTRAK, JOE DEELY,
16 and DOES 1-15, inclusive,

17 Defendants.

Case No. C05-05434 MJJ

**DEFENDANTS' OBJECTIONS TO
PLAINTIFF'S EVIDENCE IN
SUPPORT OF OPPOSITION TO
MOTION FOR SUMMARY
JUDGMENT, OR IN THE
ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

Date: May 22, 2007
Time: 9:30 a.m.
Courtroom: 11
Floor: 19
Judge: The Hon. Martin J. Jenkins

Complaint Filed: 12/30/05
FAC Filed: 2/23/06
Trial Date: 7/23/07

**[Fed.R.Civ.Proc. 56; JUDGE JENKINS'
STANDING ORDER]**

23 Defendants NATIONAL RAILROAD PASSENGER CORPORATION dba AMTRAK
24 and JOE DEELY ("Defendants") hereby object to the following evidence presented by Plaintiff
25 JOHN EARL CAMPBELL ("Plaintiff") in opposition to Defendants' motion for summary
26 judgment, or in the alternative, partial summary judgment set for hearing on May 22, 2007 before
27 this Court:

1 1. Declaration of John Earl Campbell in Opposition to Defendants' Joseph Deely and
 2 National Railroad Passenger Corporation's Motions for Summary Judgment or in the Alternative,
 3 Partial Summary Judgment

4 (a) ¶ 7 - Assumes facts not in evidence (Fed.R.Evid. 611(a)).

5 (b) ¶ 9 – Assumes facts not in evidence (Fed.R.Evid. 611(a)); speculation
 6 ((Fed.R.Evid. 602).

7 (c) ¶ 10 – Plaintiff testified at his deposition that the first violation with
 8 which he was charged resulted in a derailment. (Plaintiff's deposition ("Pl. Depo."), 113:10—
 9 115:4, 116:14—118:4, 122:2—123:6 and Pl. Depo. Exh. 13, filed with Defendants' moving
 10 papers) A party cannot oppose summary judgment purposes by submitting an affidavit or
 11 declaration that contradicts his previous testimony without sufficient explanation for the
 12 contradiction. *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975).
 13 Campbell provides no explanation for his contradictory declaration. Therefore, the only evidence
 14 before the court is the testimony Plaintiff gave during his deposition.

15 (d) ¶ 11 – Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
 16 ((Fed.R.Evid. 611(a)). Plaintiff admitted that he was responsible for the incident in 2000 and that
 17 he agreed to accept a letter of reprimand. (Pl. Depo., 119:13-15.)

18 (e) ¶ 12 - Assumes facts not in evidence (Fed.R.Evid. 611(a)).

19 (f) ¶ 13 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); hearsay
 20 (Fed.R.Evid. 802). In addition, Plaintiff's declaration makes no sense. Plaintiff did not waive (or
 21 accept responsibility) for the 2002 incident -- a hearing officer found him guilty after a formal
 22 hearing was held and based in large part on Plaintiff's own admissions. (Declaration of Gregg
 23 Baxter, ¶ 3, Ex. B; Pl. Depo., 120:4—121:7, 123:12—124:1 and Pl. Depo. Ex. 14, filed with
 24 Defendants' moving papers.)

25 (g) ¶ 14 – Plaintiff misstates the actual penalty. Although he did not serve
 26 20 days suspension, he was charged with serving ten days suspension and with ten additional
 27 days to be held in abeyance, assuming no further violation within six months time.

(h) ¶ 16 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); lacks personal knowledge (Fed.R.Evid. 602); lacks foundation. Plaintiff admitted during his deposition that he had not seen other employees cut out the brakes. (Pl. Depo., 145:4-13) Therefore, his declaration that now purports to identify others who cut out brakes should be ignored. *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975). Moreover, disarming the brakes of a parked train that is undergoing maintenance is not comparable to Plaintiff's offense on July 24, 2004. *Supplemental Declaration of Steven Shelton*, filed May 8, 2007.

(i) ¶ 18 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); hearsay (Fed.R.Evid. 802); misleadingly miscasts and mischaracterizes Gillard's deposition testimony. Gillard testified that he had not witnessed Plaintiff cut out the brakes and he initially thought he could have been responsible somehow for the incident (i.e., "hard" coupling). Gillard's belief does not mitigate the severity of Plaintiff's act. Plaintiff admitted at the hearing in 2004 that he in fact cut out the brakes. (Deposition of John Campbell, 288:23 – 289:9, filed with Defendant's moving papers.)

(j) ¶ 21 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant (Fed.R.Evid. 401-402). Seniority is not considered for promotion to Engineer. (Deposition of John Campbell, 202:11—203:10; Declaration of Susan Venturelli, ¶ 9, both filed with Defendants' moving papers.)

(k) ¶ 22 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant (Fed.R.Evid. 401-402). Seniority is not considered for promotion to Engineer. (Deposition of John Campbell, 202:11—203:10; Declaration of Susan Venturelli, ¶ 9, both filed with Defendants' moving papers.)

(l) ¶ 23 -- Assumes facts not in evidence (Fed.R.Evid. 611(a)); best evidence (Fed.R.Evid. 1002-1003). Plaintiff has no record of his applications for positions outside of Oakland. Moreover, Plaintiff admitted at deposition that *throughout* his employment, he was interested in working as an engineer in Oakland only and that he never applied for engineer openings located in other parts of the Bay Area. *See* Plaintiff's deposition ("Pl. Depo.") at 45:5-13 (Exhibit A to the supplemental declaration of Cara Ching-Senaha, filed May 8, 2007).

1 In an about face, Plaintiff states in his opposition declaration that he was interested in any
 2 engineer opening within the Bay Area after November 2002.) A party cannot oppose
 3 summary judgment purposes by submitting an affidavit or declaration that contradicts his
 4 previous testimony without sufficient explanation for the contradiction. *Radobenko v. Automated*
 5 *Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975). In this case, Campbell provides no explanation
 6 for his contradictory declaration. Therefore, the only evidence before the court is the testimony
 7 Plaintiff gave during his deposition.

8 (m) ¶ 24 - Hearsay (Fed.R.Evid. 802); lacks personal knowledge
 9 (Fed.R.Evid. 602); assumes facts not in evidence (Fed.R.Evid. 611(a)).

10 (n) ¶ 25 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); best evidence
 11 (Fed.R.Evid. 1002-1003); irrelevant (Fed.R.Evid. 401-402). Seniority is not considered for
 12 promotion to Engineer. (Deposition of John Campbell, 202:11—203:10; Declaration of Susan
 13 Venturelli, ¶ 9, both filed with Defendants' moving papers.)

14 (o) ¶ 26 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); best evidence
 15 (Fed.R.Evid. 1002-1003); irrelevant (Fed.R.Evid. 401-402). Seniority is not considered for
 16 promotion to Engineer. (Deposition of John Campbell, 202:11—203:10; Declaration of Susan
 17 Venturelli, ¶ 9, both filed with Defendants' moving papers.)

18 (p) ¶ 27 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
 19 (Fed.R.Evid. 401-402). Seniority is not considered for promotion to Engineer. (Deposition of
 20 John Campbell, 202:11—203:10; Declaration of Susan Venturelli, ¶ 9, both filed with
 21 Defendants' moving papers.)

22 (q) ¶ 28 - Best evidence (Fed.R.Evid. 1002-1003); speculation (Fed.R.Evid.
 23 602); irrelevant (Fed.R.Evid. 401-402). Plaintiff has not produced a copy of his 2003 Job
 24 Opportunity Application.

25 (r) ¶ 29 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
 26 (Fed.R.Evid. 611(a)); best evidence rule (Fed.R.Evid. 1002-1003). Plaintiff has not produced
 27 copies of his applications, in which he allegedly made his interest known. Moreover, Plaintiff
 28 admitted at deposition that *throughout* his employment, he was interested in working as an

1 engineer in Oakland only and that he never applied for engineer openings located in other parts of
 2 the Bay Area. *See* Plaintiff's deposition ("Pl. Depo.") at 45:5-13 (Exhibit A to the supplemental
 3 declaration of Cara Ching-Senaha, filed May 8, 2007). In an about face, Plaintiff states in his
 4 opposition declaration that he was interested in any engineer opening within the Bay Area after
 5 November 2002.) A party cannot oppose summary judgment purposes by submitting an affidavit
 6 or declaration that contradicts his previous testimony without sufficient explanation for the
 7 contradiction. *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975). In this
 8 case, Campbell provides no explanation for his contradictory declaration. Therefore, the only
 9 evidence before the court is the testimony Plaintiff gave during his deposition.

10 (s) ¶ 30 – Best evidence (Fed.R.Evid. 1002-1003).

11 (t) ¶ 31 – Irrelevant (Fed.R.Evid. 401-402). *Guz v. Bechtel National, Inc.*
 12 (2000) 24 Cal.4th 317, 358 (accuracy of reason is irrelevant, employer merely must honestly
 13 believe in nondiscriminatory reason); *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) **Error!**
 14 **Bookmark not defined.**; *Sheridan v. E.I. DuPont de Nemours and Co.* 100 F.3d 1061, 1072 (3d
 15 Cir. 1996); *Hersant v. Dept. of Social Services* (1997) 57 Cal.App.4th 997, 1005.

16 (u) ¶ 32 – Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
 17 (Fed.R.Evid. 611(a)); hearsay (Fed.R.Evid. 802); lacks personal knowledge (Fed.R.Evid. 602).

18 (v) ¶ 33 -- Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
 19 (Fed.R.Evid. 611(a)); hearsay (Fed.R.Evid. 802). Seniority is not considered for promotion to
 20 Engineer. (Deposition of John Campbell, 202:11—203:10; Declaration of Susan Venturelli, ¶ 9,
 21 both filed with Defendants' moving papers.)

22 (w) ¶ 35 — Improper opinion (Fed.R.Evid. 701); lack of personal knowledge
 23 (Fed.R.Evid. 602); more prejudicial than probative and confuses the issues (Fed.R.Evid. 403);
 24 improper legal conclusion; assumes facts not in evidence (Fed.R.Evid. 611(a)); hearsay
 25 (Fed.R.Evid. 802); improper character evidence (Fed.R.Evid. 404(a), 404(b)). Moreover,
 26 Plaintiff's belief that Amtrak did not promote African-Americans to Engineer is undisputedly
 27 false. *See Supplemental Declaration of Susan Venturelli; Supplemental Declaration of Steve*
 28 *Shelton*, filed May 8, 2007.

- 1 (x) ¶ 36 -- Improper opinion (Fed.R.Evid. 701); improper legal conclusion.
- 2 (y) ¶ 37 -- Improper opinion (Fed.R.Evid. 701); improper legal conclusion.
- 3 (z) ¶ 38 -- Improper opinion (Fed.R.Evid. 701); improper legal conclusion.
- 4 (aa) ¶ 39 -- Best evidence (Fed.R.Evid. 1002-1003).
- 5 (bb) ¶ 40 -- Irrelevant (Fed.R.Evid. 401-402); more prejudicial than probative
- 6 and confuses the issues (Fed.R.Evid. 403). Plaintiff admitted that he was responsible for the 2000
- 7 incident, for which he was issued a letter of reprimand. (Pl. Depo., 119:13-15.)
- 8 (cc) Exhibits: Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402);
- 9 exhibit B to Campbell's declaration in particular was improperly withheld from Plaintiff's initial
- 10 disclosures and from Plaintiff's production of documents; lacks foundation; improper
- 11 authentication.

12 2. Declaration of Mary J. Fontaine in Opposition to Defendant's Motion for

13 Summary Judgment, in *Hardeman v. Amtrak*, U.S. District Court Case No. C04 3360 SI

14 (Attachment – Exhibit 1 to Plaintiff's Request for Judicial Notice in Opposition to Defendants

15 Joseph Deely and National Railroad Passenger Corporation's Motions for Summary Judgment or

16 in the Alternative, Partial Summary Judgment ("Request for Judicial Notice"), filed May 1,

17 2007):

18 (a) Entire declaration – A declaration of a witness in another case may not

19 be submitted to the Court as evidence for consideration through a Request for Judicial Notice.

20 *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31, 36 (1st Cir. 2005) ("plaintiffs [opposing

21 Defendants' motion for summary judgment in an employment discrimination case] made no

22 attempt to specify what 'adjudicable facts' met the requirements of Federal Rule of Evidence 201.

23 Not only do pleadings, parties, issues, and facts differ in different cases, but plaintiffs cannot

24 sidestep their neglect to offer evidence in this case by asking the court to rule on the basis of the

25 record in another case Refusal to take judicial notice was amply justified.")

26 (b) Entire declaration – irrelevant (Fed.R.Evid. 401-402); more prejudicial

27 than probative and confuses the issues (Fed.R.Evid. 403); lacks foundation. Declarant has not

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1 worked with Defendant Joseph Deely for fifteen years. Moreover, declarant has never worked
2 with Plaintiff John Campbell.

3 (c) ¶ 7 - Hearsay (Fed.R.Evid. 802); improper opinion (Fed.R.Evid. 701);
4 lack of personal knowledge (Fed.R.Evid. 602); more prejudicial than probative and confuses the
5 issues (Fed.R.Evid. 403); improper legal conclusion; improper character evidence (Fed.R.Evid.
6 404(a), 404(b)).

7 (d) ¶ 8 - Hearsay (Fed.R.Evid. 802); lack of personal knowledge
8 (Fed.R.Evid. 602); more prejudicial than probative and confuses the issues (Fed.R.Evid. 403);
9 improper character evidence (Fed.R.Evid. 404(a), 404(b)); improper opinion (Fed.R.Evid. 701).

10 (e) ¶ 12 - Hearsay (Fed.R.Evid. 802); improper opinion (Fed.R.Evid. 701);
11 lack of personal knowledge (Fed.R.Evid. 602); more prejudicial than probative and confuses the
12 issues (Fed.R.Evid. 403); improper legal conclusion; improper character evidence (Fed.R.Evid.
13 404(a), 404(b)).

14 (f) ¶ 13 - Hearsay (Fed.R.Evid. 802); improper opinion (Fed.R.Evid. 701);
15 lack of personal knowledge (Fed.R.Evid. 602); more prejudicial than probative and confuses the
16 issues (Fed.R.Evid. 403); improper character evidence (Fed.R.Evid. 404(a), 404(b)).

17 (g) ¶ 14 - Improper opinion (Fed.R.Evid. 701); lack of personal knowledge
18 (Fed.R.Evid. 602); more prejudicial than probative and confuses the issues (Fed.R.Evid. 403).

19 (h) ¶ 15 - Irrelevant (Fed.R.Evid. 401-402); lack of personal knowledge
20 (Fed.R.Evid. 602); hearsay (Fed.R.Evid. 802); more prejudicial than probative and confuses the
21 issues (Fed.R.Evid. 403).

22 (i) ¶ 16 - Irrelevant (Fed.R.Evid. 401-402); lack of personal knowledge
23 (Fed.R.Evid. 602); more prejudicial than probative and confuses the issues (Fed.R.Evid. 403);
24 improper opinion (Fed.R.Evid. 701).

25 (j) ¶ 17 - Speculation (Fed.R.Evid. 602); irrelevant (Fed.R.Evid. 401-402);
26 more prejudicial than probative and confuses the issues (Fed.R.Evid. 403).

27 (k) ¶ 18 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); speculation
28 (Fed.R.Evid. 602); irrelevant (Fed.R.Evid. 401-402); more prejudicial than probative and

1 confuses the issues (Fed.R.Evid. 403); improper opinion (Fed.R.Evid. 701); speculation
2 (Fed.R.Evid. 602).

3 (l) ¶ 19 – Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
4 (Fed.R.Evid. 401-402).

5 (m) ¶ 20 – Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
6 (Fed.R.Evid. 401-402); more prejudicial than probative and confuses the issues (Fed.R.Evid.
7 403); improper opinion (Fed.R.Evid. 701); improper character evidence (Fed.R.Evid. 404(a),
8 404(b)).

9 (n) ¶ 21 – Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
10 (Fed.R.Evid. 401-402); more prejudicial than probative and confuses the issues (Fed.R.Evid.
11 403); improper opinion (Fed.R.Evid. 701).

12 3. Declaration of Debrice Gallo in Opposition to Defendant's Motion for Summary
13 Judgment, in *Hardeman v. Amtrak*, U.S. District Court Case No. C04 3360 SI (Exhibit 2 to
14 Plaintiff's Request for Judicial Notice, filed May 1, 2007):

15 (a) Entire declaration – A declaration of a witness in another case may not
16 be submitted to the Court as evidence for consideration through a Request for Judicial Notice.
17 *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31, 36 (1st Cir. 2005) (“plaintiffs [opposing
18 Defendants’ motion for summary judgment in an employment discrimination case] made no
19 attempt to specify what ‘adjudicable facts’ met the requirements of Federal Rule of Evidence 201.
20 Not only do pleadings, parties, issues, and facts differ in different cases, but plaintiffs cannot
21 sidestep their neglect to offer evidence in this case by asking the court to rule on the basis of the
22 record in another case Refusal to take judicial notice was amply justified.”)

23 (b) Entire declaration – irrelevant (Fed.R.Evid. 401-402); more prejudicial
24 than probative and confuses the issues (Fed.R.Evid. 403); lacks foundation. Declarant did not
25 work with Plaintiff John Campbell during any of the three major safety violations for which he
26 either admitted responsibility, or was found by a neutral hearing officer to be responsible, for.

27 (c) ¶ 3 – Irrelevant (Fed.R.Evid. 401-402). Seniority is not considered for
28 promotion to Engineer. (Deposition of John Campbell, 202:11—203:10; Declaration of Susan

1 Venturelli, ¶ 9, both filed with Defendants' moving papers.) If anything, Gallo's declaration
2 shows that Amtrak promotes African-American employees to Engineer.

3 (d) ¶ 4 – Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
4 (Fed.R.Evid. 611(a)). Seniority is not considered for promotion to Engineer. (Deposition of John
5 Campbell, 202:11—203:10; Declaration of Susan Venturelli, ¶ 9, both filed with Defendants' moving
6 papers.)

7 (e) ¶ 5 – Best evidence (Fed.R.Evid. 1002-1003); irrelevant (Fed.R.Evid.
8 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)). Seniority is not considered for
9 promotion to Engineer. (Deposition of John Campbell, 202:11—203:10; Declaration of Susan
10 Venturelli, ¶ 9, both filed with Defendants' moving papers.)

11 (f) ¶ 6 – Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
12 (Fed.R.Evid. 611(a)). Seniority is not considered for promotion to Engineer. (Deposition of John
13 Campbell, 202:11—203:10; Declaration of Susan Venturelli, ¶ 9, both filed with Defendants' moving
14 papers.)

15 (g) ¶ 7 – Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
16 (Fed.R.Evid. 611(a)).

17 (h) ¶ 10 - Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402);
18 assumes facts not in evidence (Fed.R.Evid. 611(a)).

19 (i) ¶ 12 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
20 (Fed.R.Evid. 611(a)).

21 (j) ¶ 13 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
22 (Fed.R.Evid. 611(a)).

23 (k) ¶ 14 - Irrelevant (Fed.R.Evid. 401-402).

24 (l) ¶ 15 - Irrelevant (Fed.R.Evid. 401-402).

25 (m) ¶ 16 - Irrelevant (Fed.R.Evid. 401-402).

26 (n) ¶ 17 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
27 (Fed.R.Evid. 611(a)); improper opinion (Fed.R.Evid. 701).
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(o) ¶ 20 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); improper opinion (Fed.R.Evid. 701).

(p) ¶ 21 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); improper opinion (Fed.R.Evid. 701).

(q) ¶ 22 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); improper opinion (Fed.R.Evid. 701).

(r) ¶ 23 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); improper opinion (Fed.R.Evid. 701); lack of personal knowledge (Fed.R.Evid. 602).

(s) ¶ 24 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); lack of personal knowledge (Fed.R.Evid. 602).

(t) ¶ 25 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); lack of personal knowledge (Fed.R.Evid. 602).

(u) ¶ 26 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)).

4. Declaration of Faheem Hardeman in Opposition to Defendant's Motion for Summary Judgment, in *Hardeman v. Amtrak*, U.S. District Court Case No. C04 3360 SI (Exhibit 3 to Plaintiff's Request for Judicial Notice):

(a) Entire declaration – A declaration of a witness in another case may not be submitted to the Court as evidence for consideration through a Request for Judicial Notice. *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31, 36 (1st Cir. 2005) (“plaintiffs [opposing Defendants’ motion for summary judgment in an employment discrimination case] made no attempt to specify what ‘adjudicable facts’ met the requirements of Federal Rule of Evidence 201. Not only do pleadings, parties, issues, and facts differ in different cases, but plaintiffs cannot sidestep their neglect to offer evidence in this case by asking the court to rule on the basis of the record in another case Refusal to take judicial notice was amply justified.”)

(b) Entire declaration - irrelevant (Fed.R.Evid. 401-402); lacks foundation; more prejudicial than probative and confuses the issues (Fed.R.Evid. 403). Declarant did not

1 work with Plaintiff John Campbell. If anything, Hardeman's declaration shows that Amtrak
2 promotes African-American employees to Engineer.

3 (c) ¶ 6 - Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402).
4 Seniority is not considered for promotion to Engineer. (Deposition of John Campbell, 202:11—
5 203:10; Declaration of Susan Venturelli, ¶ 9, both filed with Defendants' moving papers.)

6 (d) ¶ 7 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
7 (Fed.R.Evid. 401-402); improper opinion (Fed.R.Evid. 701). Seniority is not considered for
8 promotion to Engineer. (Deposition of John Campbell, 202:11—203:10; Declaration of Susan
9 Venturelli, ¶ 9, both filed with Defendants' moving papers.)

10 (e) ¶ 8 - Irrelevant (Fed.R.Evid. 401-402). Seniority is not considered for
11 promotion to Engineer. (Deposition of John Campbell, 202:11—203:10; Declaration of Susan
12 Venturelli, ¶ 9, both filed with Defendants' moving papers.)

13 (f) ¶ 9 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); speculation
14 (Fed.R.Evid. 602); irrelevant (Fed.R.Evid. 401-402); improper opinion (Fed.R.Evid. 701).
15 "Where special qualifications are necessary [for the job], the relevant statistical pool for purposes
16 of demonstrating discriminatory exclusion must [include] the number of minorities qualified to
17 undertake the particular task." *People v. Bell* (1989) 49 Cal.3d 502, 555, quoting *Hazelwood*
18 *School Dist. v. United States* (1977) 433 U.S. 299, 308, 53 L.Ed.2d 768, 97 S.Ct. 2736. Without
19 such evidence, it is impossible to evaluate overall minority representation or draw a negative
20 inference of discrimination. *See also* Supplemental Declaration of Susan Venturelli, filed May 8,
21 2007.

22 (g) ¶ 10 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
23 (Fed.R.Evid. 611(a)); best evidence rule (Fed.R.Evid. 1002-1003).

24 (h) ¶ 11 - Best evidence rule (Fed.R.Evid. 1002-1003); irrelevant
25 (Fed.R.Evid. 401-402).

26 (i) ¶ 12 - Best evidence rule (Fed.R.Evid. 1002-1003); irrelevant
27 (Fed.R.Evid. 401-402).
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1 (j) ¶ 13 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); speculation
2 (Fed.R.Evid. 602); irrelevant (Fed.R.Evid. 401-402); improper opinion (Fed.R.Evid. 701).

3 (k) ¶ 14 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); hearsay
4 (Fed.R.Evid. 802); speculation (Fed.R.Evid. 602).

5 (l) ¶ 15 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
6 (Fed.R.Evid. 401-402).

7 (m) ¶ 16 - Best evidence rule (Fed.R.Evid. 1002-1003); irrelevant
8 (Fed.R.Evid. 401-402).

9 (n) ¶ 17 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
10 (Fed.R.Evid. 401-402).

11 (o) ¶ 18 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
12 (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

13 (p) ¶ 19 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
14 (Fed.R.Evid. 401-402).

15 (q) ¶ 20 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
16 (Fed.R.Evid. 401-402).

17 (r) ¶ 21 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
18 (Fed.R.Evid. 401-402).

19 (s) ¶ 22 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
20 (Fed.R.Evid. 401-402); speculation (Fed.R.Evid. 602).

21 (t) ¶ 26 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

22 (u) ¶ 32 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
23 (Fed.R.Evid. 401-402); speculation (Fed.R.Evid. 602).

24 (v) ¶ 33 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant
25 (Fed.R.Evid. 401-402); improper opinion (Fed.R.Evid. 701); lack of personal knowledge
26 (Fed.R.Evid. 602). improper character evidence (Fed.R.Evid. 404(a), 404(b)).
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(w) ¶ 34 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant (Fed.R.Evid. 401-402); speculation (Fed.R.Evid. 602); lack of personal knowledge (Fed.R.Evid. 602). improper character evidence (Fed.R.Evid. 404(a), 404(b)).

(x) ¶ 35 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant (Fed.R.Evid. 401-402).

(y) ¶ 36 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

(z) ¶ 37 - Irrelevant (Fed.R.Evid. 401-402).

(aa) ¶ 38 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

(bb) ¶ 39 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

(cc) ¶ 40 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); speculation (Fed.R.Evid. 602).

(dd) ¶ 42 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

(ee) ¶ 43 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); assumes facts not in evidence (Fed.R.Evid. 611(a)).

(ff) ¶ 44 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402).

(gg) ¶ 45 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); hearsay (Fed.R.Evid. 802); lacks personal knowledge (Fed.R.Evid. 602).

(hh) ¶ 46 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

(ii) ¶ 47 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); assumes facts not in evidence (Fed.R.Evid. 611(a)).

(jj) ¶ 48 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); assumes facts not in evidence (Fed.R.Evid. 611(a)).

(kk) ¶ 49 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); assumes facts not in evidence (Fed.R.Evid. 611(a)).

(ll) ¶ 50 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); assumes facts not in evidence (Fed.R.Evid. 611(a)); lack of personal knowledge (Fed.R.Evid. 602).

(mm) ¶ 51 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); assumes facts not in evidence (Fed.R.Evid. 611(a)); lack of personal knowledge (Fed.R.Evid. 602).

(nn) ¶ 52 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); assumes facts not in evidence (Fed.R.Evid. 611(a)).

(oo) ¶ 53 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); speculation (Fed.R.Evid. 602); lack of personal knowledge (Fed.R.Evid. 602).

(pp) ¶ 54 - Irrelevant (Fed.R.Evid. 401-402); improper opinion (Fed.R.Evid. 701); lack of personal knowledge (Fed.R.Evid. 602).

(qq) ¶ 55 - Irrelevant (Fed.R.Evid. 401-402).

(rr) Declaration exhibits: Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402).

5. Declaration of Meriola Gotthardt in Opposition to Defendant's Motion for Summary Judgment, in *Morgan v. Amtrak*, U.S. District Court Case No. C96-03585 SI (Exhibit 4 to Plaintiff's Request for Judicial Notice):

(a) Entire declaration – A declaration of a witness in another case may not be submitted to the Court as evidence for consideration through a Request for Judicial Notice. *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31, 36 (1st Cir. 2005) (“plaintiffs [opposing Defendants’ motion for summary judgment in an employment discrimination case] made no attempt to specify what ‘adjudicable facts’ met the requirements of Federal Rule of Evidence 201. Not only do pleadings, parties, issues, and facts differ in different cases, but plaintiffs cannot sidestep their neglect to offer evidence in this case by asking the court to rule on the basis of the record in another case Refusal to take judicial notice was amply justified.”)

(b) Entire declaration – Plaintiff did not disclose Meriola Gotthardt as a witness in Plaintiff's initial disclosures. Fed.R.Civ.P. Rule 37(c)(1) (“A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is

harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.”)

(c) Entire declaration – irrelevant ((Fed.R.Evid. 401-402); improper character evidence (Fed.R.Evid. 404(a), 404(b)); lacks foundation; more prejudicial than probative and confuses the issues (Fed.R.Evid. 403).

(d) ¶ 2 - Hearsay (Fed.R.Evid. 802); assumes facts not in evidence (Fed.R.Evid. 611(a)); – irrelevant ((Fed.R.Evid. 401-402).

(e) ¶ 3 - Hearsay (Fed.R.Evid. 802); irrelevant ((Fed.R.Evid. 401-402); improper character evidence (Fed.R.Evid. 404(a), 404(b)).

(f) ¶ 4 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); improper character evidence (Fed.R.Evid. 404(a), 404(b)).

(g) ¶ 5 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)).

(h) ¶ 6 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

(i) ¶ 7 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

6. Declaration of Michael Williams in Opposition to Defendant’s Motion for Summary Judgment, in *Morgan v. Amtrak*, U.S. District Court Case No. C96-03585 SI (Exhibit 5 to Plaintiff’s Request for Judicial Notice):

(a) Entire declaration – A declaration of a witness in another case may not be submitted to the Court as evidence for consideration through a Request for Judicial Notice. A declaration of a witness in another case may not be submitted to the Court as evidence for consideration through a Request for Judicial Notice. *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31, 36 (1st Cir. 2005) (“plaintiffs [opposing Defendants’ motion for summary judgment in an employment discrimination case] made no attempt to specify what ‘adjudicable facts’ met the requirements of Federal Rule of Evidence 201. Not only do pleadings, parties, issues, and facts differ in different cases, but plaintiffs cannot sidestep their neglect to offer evidence in this case by asking the court to rule on the basis of the record in another case Refusal to take judicial notice was amply justified.”)

(b) Entire declaration - Irrelevant (Fed.R.Evid. 401-402); improper character evidence (Fed.R.Evid. 404(a), 404(b)); lacks foundation; more prejudicial than probative and confuses the issues (Fed.R.Evid. 403). Declarant does not claim to have ever worked with Plaintiff Campbell, Joe Deely or Steven Shelton.

(c) ¶ 2 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

(d) ¶ 3 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

(e) ¶ 4 - Best evidence rule (Fed.R.Evid. 1002-1003); more prejudicial than probative and confuses the issues (Fed.R.Evid. 403); irrelevant (Fed.R.Evid. 401-402); improper character evidence (Fed.R.Evid. 404(a), 404(b)).

7. Declaration of Joe George in Opposition to Defendant's Motion for Summary Judgment, in *Morgan v. Amtrak*, U.S. District Court Case No. C96-03585 SI (Exhibit 6 to Plaintiff's Request for Judicial Notice):

(a) Entire declaration – A declaration of a witness in another case may not be submitted to the Court as evidence for consideration through a Request for Judicial Notice. A declaration of a witness in another case may not be submitted to the Court as evidence for consideration through a Request for Judicial Notice. *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31, 36 (1st Cir. 2005) (“plaintiffs [opposing Defendants’ motion for summary judgment in an employment discrimination case] made no attempt to specify what ‘adjudicable facts’ met the requirements of Federal Rule of Evidence 201. Not only do pleadings, parties, issues, and facts differ in different cases, but plaintiffs cannot sidestep their neglect to offer evidence in this case by asking the court to rule on the basis of the record in another case Refusal to take judicial notice was amply justified.”)

(b) Entire declaration: irrelevant (Fed.R.Evid. 401-402); improper character evidence (Fed.R.Evid. 404(a), 404(b)); lacks foundation; more prejudicial than probative and confuses the issues (Fed.R.Evid. 403). Declarant does not claim to have ever worked with Plaintiff Campbell, Joe Deely or Steven Shelton.

(c) ¶ 4 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

(d) ¶ 5 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); assumes facts not in evidence (Fed.R.Evid. 611(a)); improper character evidence (Fed.R.Evid. 404(a), 404(b)).

(e) ¶ 6 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); improper character evidence (Fed.R.Evid. 404(a), 404(b)).

(f) ¶ 7 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); assumes facts not in evidence (Fed.R.Evid. 611(a)); lacks personal knowledge (Fed.R.Evid. 602).

8. Declaration of Arthur Elwood Conley in Opposition to Defendant's Motion for Summary Judgment, in *Morgan v. Amtrak*, U.S. District Court Case No. C96-03585 SI (Exhibit 7 to Plaintiff's Request for Judicial Notice):

(a) Entire declaration – A declaration of a witness in another case may not be submitted to the Court as evidence for consideration through a Request for Judicial Notice. A declaration of a witness in another case may not be submitted to the Court as evidence for consideration through a Request for Judicial Notice. *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31, 36 (1st Cir. 2005) (“plaintiffs [opposing Defendants’ motion for summary judgment in an employment discrimination case] made no attempt to specify what ‘adjudicable facts’ met the requirements of Federal Rule of Evidence 201. Not only do pleadings, parties, issues, and facts differ in different cases, but plaintiffs cannot sidestep their neglect to offer evidence in this case by asking the court to rule on the basis of the record in another case Refusal to take judicial notice was amply justified.”)

(b) Entire declaration – Plaintiff did not disclose Arthur Elwood Conley as a witness in Plaintiff's initial disclosures pursuant to Fed.R.Civ.P. 26(a)(1). Fed.R.Civ.P. Rule 37(c)(1) (“A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.”)

(c) Entire declaration – irrelevant (Fed.R.Civ.Proc. 401-402); improper character evidence (Fed.R.Evid. 404(a), 404(b)); lacks foundation; more prejudicial than

1 probative and confuses the issues (Fed.R.Evid. 403). Declarant does not claim to have worked
2 with Plaintiff, Joe Deely or Steve Shelton.

3 (d) ¶ 3 - Irrelevant (Fed.R.Evid. 401-402)

4 (e) ¶ 4 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802);
5 assumes facts not in evidence (Fed.R.Evid. 611(a)).

6 (f) ¶ 5 - Irrelevant (Fed.R.Evid. 401-402).

7 (g) ¶ 6 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802);
8 improper character evidence (Fed.R.Evid. 404(a), 404(b)).

9 9. Amended Declaration of Abner J. Morgan, Jr. in Opposition to Defendant's
10 Motion for Summary Judgment, in *Morgan v. Amtrak*, U.S. District Court Case No. C96-03585
11 SI (Exhibit 8 to Plaintiff's Request for Judicial Notice):

12 (a) Entire declaration – A declaration of a witness in another case may not
13 be submitted to the Court as evidence for consideration through a Request for Judicial Notice. A
14 declaration of a witness in another case may not be submitted to the Court as evidence for
15 consideration through a Request for Judicial Notice. *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d
16 31, 36 (1st Cir. 2005) (“plaintiffs [opposing Defendants’ motion for summary judgment in an
17 employment discrimination case] made no attempt to specify what ‘adjudicable facts’ met the
18 requirements of Federal Rule of Evidence 201. Not only do pleadings, parties, issues, and facts
19 differ in different cases, but plaintiffs cannot sidestep their neglect to offer evidence in this case
20 by asking the court to rule on the basis of the record in another case Refusal to take judicial
21 notice was amply justified.”)

22 (b) Entire declaration – Plaintiff did not disclose Abner J. Morgan as a
23 witness in Plaintiff's initial disclosures pursuant to Fed.R.Civ.P. 26(a)(1). Fed.R.Civ.P. Rule
24 37(c)(1) (“A party that without substantial justification fails to disclose information required by
25 Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is
26 not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a
27 motion any witness or information not so disclosed.”)

(c) Entire declaration – irrelevant (Fed.R.Evid. 401-402); lacks foundation; more prejudicial than probative and confuses the issues (Fed.R.Evid. 403). Declarant makes no representations about Plaintiff Campbell, Joe Deely or Steven Shelton. In addition, declarant makes no statements about any of the incidents to which Plaintiff either admitted guilt or was found guilty by a neutral hearing officer.

(d) ¶ 3 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)).

(e) ¶ 4 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); hearsay (Fed.R.Evid. 802); improper opinion (Fed.R.Evid. 701).

(f) ¶ 5 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)).

(g) ¶ 6 - Irrelevant (Fed.R.Evid. 401-402); improper character evidence (Fed.R.Evid. 404(a), 404(b)).

(h) ¶ 7 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); improper character evidence (Fed.R.Evid. 404(a), 404(b)).

(i) ¶ 8 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); hearsay (Fed.R.Evid. 802).

(j) ¶ 9 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); best evidence (Fed.R.Evid. 1002-1003).

(k) ¶ 10 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); best evidence (Fed.R.Evid. 1002-1003); hearsay (Fed.R.Evid. 802).

(l) ¶ 11 - Irrelevant (Fed.R.Evid. 401-402); improper opinion (Fed.R.Evid. 701); improper character evidence (Fed.R.Evid. 404(a), 404(b)).

(m) ¶ 12 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); best evidence rule (Fed.R.Evid. 1002-1003); improper opinion (Fed.R.Evid. 701); improper character evidence (Fed.R.Evid. 404(a), 404(b)).

(n) ¶ 13 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)); best evidence (Fed.R.Evid. 1002-1003).

1 (o) ¶ 14 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
2 (Fed.R.Evid. 611(a)); best evidence (Fed.R.Evid. 1002-1003).

3 (p) ¶ 15 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
4 (Fed.R.Evid. 611(a)).

5 (q) ¶ 16 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
6 (Fed.R.Evid. 611(a)); speculation (Fed.R.Evid. 602); improper opinion (Fed.R.Evid. 701);
7 improper character evidence (Fed.R.Evid. 404(a), 404(b)).

8 (r) ¶ 17 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
9 (Fed.R.Evid. 611(a)); best evidence (Fed.R.Evid. 1002-1003).

10 (s) ¶ 18 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802);
11 assumes facts not in evidence (Fed.R.Evid. 611(a)).

12 (t) ¶ 19 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802);
13 assumes facts not in evidence (Fed.R.Evid. 611(a)).

14 (u) ¶ 20 - Irrelevant (Fed.R.Evid. 401-402); best evidence (Fed.R.Evid.
15 1002-1003).

16 (v) ¶ 21 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
17 (Fed.R.Evid. 611(a)).

18 (w) ¶ 22 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802);
19 assumes facts not in evidence (Fed.R.Evid. 611(a)).

20 (x) ¶ 24 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
21 (Fed.R.Evid. 611(a)).

22 (y) ¶ 25 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
23 (Fed.R.Evid. 611(a)).

24 (z) ¶ 26 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
25 (Fed.R.Evid. 611(a)); lacks personal knowledge (Fed.R.Evid. 602).

26 (aa) ¶ 27 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
27 (Fed.R.Evid. 611(a)).
28

1 (bb) ¶ 28 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
2 (Fed.R.Evid. 611(a)).

3 (cc) ¶ 29 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
4 (Fed.R.Evid. 611(a)).

5 (dd) ¶ 30 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
6 (Fed.R.Evid. 611(a)).

7 (ee) ¶ 31 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
8 (Fed.R.Evid. 611(a)); best evidence (Fed.R.Evid. 1002-1003); improper legal conclusion.

9 (ff) ¶ 32 - Irrelevant (Fed.R.Evid. 401-402); best evidence (Fed.R.Evid.
10 1002-1003).

11 (gg) ¶ 33 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
12 (Fed.R.Evid. 611(a)); improper opinion (Fed.R.Evid. 701).

13 (hh) ¶ 34 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
14 (Fed.R.Evid. 611(a)).

15 (ii) ¶ 35-37 - Irrelevant (Fed.R.Evid. 401-402).

16 (jj) ¶ 38 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802)

17 (kk) ¶ 39 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802);
18 assumes facts not in evidence (Fed.R.Evid. 611(a)); improper opinion (Fed.R.Evid. 701).

19 (ll) ¶ 40 - Irrelevant (Fed.R.Evid. 401-402).

20 (mm) ¶ 41 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
21 (Fed.R.Evid. 611(a)); improper opinion (Fed.R.Evid. 701).

22 (nn) ¶ 42 - Irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence
23 (Fed.R.Evid. 611(a)); hearsay (Fed.R.Evid. 802)

24 (oo) ¶ 43 - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

25 (pp) ¶ 44 - Irrelevant (Fed.R.Evid. 401-402); improper opinion (Fed.R.Evid.
26 701); improper conclusion.

27 (qq) ¶ 45 - Irrelevant (Fed.R.Evid. 401-402); improper opinion (Fed.R.Evid.
28 701); improper conclusion.

(rr) ¶ 46 - Irrelevant (Fed.R.Evid. 401-402).

(ss) ¶ 47 - Irrelevant (Fed.R.Evid. 401-402); improper opinion (Fed.R.Evid. 701).

(tt) (ss) Exhibits: Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802).

10. Declaration of Chad M. Skinner in Opposition to Defendants' Joseph Deely and National Railroad Passenger Corporation's Motions for Summary Judgment or in the Alternative, Partial Summary Judgment:

(a) ¶ 3 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); hearsay (Fed.R.Evid. 802); lacks personal knowledge (Fed.R.Evid. 602); lacks foundation.

(b) ¶ 4 - Hearsay (Fed.R.Evid. 802); assumes facts not in evidence (Fed.R.Evid. 611(a)); lacks personal knowledge (Fed.R.Evid. 602).

(c) ¶ 6 - Hearsay (Fed.R.Evid. 802); assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant (Fed.R.Evid. 401-402).

(d) ¶ 7 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); hearsay (Fed.R.Evid. 802); lacks personal knowledge (Fed.R.Evid. 602); irrelevant (Fed.R.Evid. 401-402).

(e) ¶ 8 - Hearsay (Fed.R.Evid. 802); assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant (Fed.R.Evid. 401-402); lacks foundation. Splitting switches is not the same as cutting out the brakes during a move.

(f) ¶ 9 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); irrelevant (Fed.R.Evid. 401-402). Moreover, disarming the brakes of a parked train that is undergoing maintenance is not comparable to Plaintiff's offense on July 24, 2004. *Supplemental Declaration of Steven Shelton*, filed May 8, 2007.

(g) ¶ 10 - Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402). At most, this statement tends to show that there was favoritism towards members of the BLET union, without respect to race.

(h) ¶ 11 - Hearsay (Fed.R.Evid. 802); lacks foundation.

(i) ¶ 12 - Hearsay (Fed.R.Evid. 802); speculation (Fed.R.Evid. 602).

(j) ¶ 13 - Hearsay (Fed.R.Evid. 802).

(i) Exhibits: Hearsay (Fed.R.Evid. 802); best evidence rule (Fed.R.Evid. 1002-1003); irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence (Fed.R.Evid. 611(a)).

11. Declaration of Richard Barnes in Opposition to Defendants' Joseph Deely and National Railroad Passenger Corporation's Motions for Summary Judgment or in the Alternative, Partial Summary Judgment

(a) ¶ 6 - Hearsay (Fed.R.Evid. 802); lacks foundation; assumes facts not in evidence (Fed.R.Evid. 611(a)).

(b) ¶ 7 - Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402); improper opinion (Fed.R.Evid. 701).

(c) ¶ 8 - Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402).

(d) ¶ 9 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); improper opinion (Fed.R.Evid. 701); irrelevant (Fed.R.Evid. 401-402). Splitting switches is not the same as cutting out the brakes during a move.

(e) ¶ 10 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); improper opinion (Fed.R.Evid. 701); irrelevant (Fed.R.Evid. 401-402). Disarming the brakes of a parked train that is undergoing maintenance is not comparable to Plaintiff's offense on July 24, 2004. *Supplemental Declaration of Steven Shelton*, filed May 8, 2007.

(f) ¶ 11 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); improper opinion (Fed.R.Evid. 701); hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402).

(g) ¶ 12 - Irrelevant (Fed.R.Evid. 401-402); improper opinion (Fed.R.Evid. 701); assumes facts not in evidence (Fed.R.Evid. 611(a)).

12. Transcript of Deposition of Joe Deely, dated February 15, 2007 (Exhibit A to the Declaration of Pamela Price in Opposition to Defendants Joseph Deely and National Railroad Passenger Corporation's Motions for Summary Judgment, or in the Alternative, Partial Summary Judgment ("Price Decl.")):

- 1 (a) 10:3-5 - Best evidence (Fed.R.Evid. 1002-1003)
- 2 (b) 25:2-4, 6, 9, 13-18 - Best evidence (Fed.R.Evid. 1002-1003); irrelevant
3 (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); more prejudicial than probative and confuses
4 the issues (Fed.R.Evid. 403); improper character evidence (Fed.R.Evid. 404(a), 404(b)).
- 5 (c) 60:22-61:4 - Assumes facts not in evidence (Fed.R.Evid. 611(a));
6 improper opinion (Fed.R.Evid. 701).
- 7 (d) 61:19-24 - Assumes facts not in evidence (Fed.R.Evid. 611(a));
8 improper opinion (Fed.R.Evid. 701).
- 9 (e) 65:4-7 - Assumes facts not in evidence (Fed.R.Evid. 611(a)); more
10 prejudicial than probative and confuses the issues (Fed.R.Evid. 403).
- 11 (f) Exhibits: Assumes facts not in evidence (Fed.R.Evid. 611(a)); improper
12 opinion (Fed.R.Evid. 701); hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402).

13 13. Transcript of Deposition of Joe Deely, dated February 15, 2007, taken in the case
14 of *Howard v. National Railroad Passenger Corporation, et al.*, U.S. Dist. Court Case No. C05-
15 4069 SI

16 (a) Deposition testimony of a witness in another case may not be submitted
17 to the Court as evidence for consideration in opposition to Defendants' motion for summary
18 judgment. *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31, 36 (1st Cir. 2005) ("plaintiffs
19 [opposing Defendants' motion for summary judgment in an employment discrimination case]
20 made no attempt to specify what 'adjudicable facts' met the requirements of Federal Rule of
21 Evidence 201. Not only do pleadings, parties, issues, and facts differ in different cases, but
22 plaintiffs cannot sidestep their neglect to offer evidence in this case by asking the court to rule on
23 the basis of the record in another case Refusal to take judicial notice was amply justified.")

24 (b) 151-152 - Irrelevant (Fed.R.Evid. 401-402).

25 14. Transcript of Deposition of Richard Barrow, dated March 26, 2007:

26 (a) 18:9-20:6, 23:7-24:4 – Hearsay (Fed.R.Evid. 802); assumes facts not in
27 evidence ((Fed.R.Evid. 611(a)); improper opinion (Fed.R.Evid. 701); hearsay (Fed.R.Evid. 802);
28 irrelevant (Fed.R.Evid. 401-402); lacks foundation. Disarming the brakes of a parked train that is

undergoing maintenance is not comparable to Plaintiff's offense on July 24, 2004. *Supplemental Declaration of Steven Shelton*, filed May 8, 2007.

(b) 20:7-21:2 – Irrelevant (Fed.R.Evid. 401-402). Whether declarant thought cutting out the trucks during a move was a big deal or not is irrelevant. The issue is not whether others may have committed the same exact offense as Plaintiff because even if they had, Steve Shelton, the person who charged Plaintiff with the July 2004 incident and who made the decision to terminate his employment, *honestly believed* that it was appropriate for Amtrak to fire Plaintiff based on Plaintiff's disciplinary history and admission that he knowingly and willfully cut out the brakes of a locomotive prior to coupling it with another train. Shelton previously testified that he knew of no one else who had committed the same offense, under the same circumstances, as Plaintiff. *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358 (accuracy of reason is irrelevant, employer merely must honestly believe in nondiscriminatory reason); *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994); *Sheridan v. E.I. DuPont de Nemours and Co.* 100 F.3d 1061, 1072 (3d Cir. 1996); *Hersant v. Dept. of Social Services* (1997) 57 Cal.App.4th 997, 1005.

(c) 24:6-16 - Hearsay (Fed.R.Evid. 802)

(d) 37:8-25 - Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence ((Fed.R.Evid. 611(a))); improper opinion (Fed.R.Evid. 701); hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402); lacks foundation. Disarming the brakes of a parked train that is undergoing maintenance is not comparable to Plaintiff's offense on July 24, 2004. *Supplemental Declaration of Steven Shelton*, filed May 8, 2007.

(e) 39:4 – 41:5 - Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence ((Fed.R.Evid. 611(a))); speculation; improper opinion (Fed.R.Evid. 701); hearsay (Fed.R.Evid. 802); lacks foundation. Disarming the brakes of a parked train that is undergoing maintenance is not comparable to Plaintiff's offense on July 24, 2004. *Supplemental Declaration of Steven Shelton*, filed May 8, 2007.

(f) 41:21—42:17 - Hearsay (Fed.R.Evid. 802); lacks personal knowledge (Fed.R.Evid. 602).

(g) 47:21-48:1 - Hearsay (Fed.R.Evid. 802)

15. Transcript of Deposition of Anthony Gillard, dated March 7, 2007:

(a) 18:6—21:13, 46:13—48:1 - Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence ((Fed.R.Evid. 611(a)); speculation; improper opinion (Fed.R.Evid. 701); lacks foundation. That Assistant Conductor Anthony Gillard, who had not witnessed Plaintiff cut out the brakes and therefore did not why the locomotive rolled uncontrollably, initially thought he could have been responsible somehow for the hard coupling that occurred does not mitigate the severity of Plaintiff's admitted cutting of the brakes.

(b) 21:14—24:16 - Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence ((Fed.R.Evid. 611(a)); speculation; improper opinion (Fed.R.Evid. 701); lacks foundation. Plaintiff had the ability to call any witness he desired to testify at the investigative hearing. Why Plaintiff and his union representative did not call other witnesses to testify on Plaintiff's behalf is irrelevant. Plaintiff appealed the Hearing Officer's decision to the Labor Relations officer, and the Public Law Board, each of which upheld Amtrak's decision to terminate Plaintiff's employment. *Declaration of Steven Shelton*, ¶ 5, filed with Defendants' moving papers.)

(c) 26:3—30:15 - Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence ((Fed.R.Evid. 611(a)); speculation; improper opinion (Fed.R.Evid. 701); lacks foundation. Splitting switches is not the same as cutting out the brakes during a move. Moreover, disarming the brakes of a parked train that is undergoing maintenance is not comparable to Plaintiff's offense on July 24, 2004. *Supplemental Declaration of Steven Shelton*, filed May 8, 2007.

16. Transcript of Deposition of Steven Edward Shelton, dated April 4, 2007:

(a) 43:14-- 45:10, 87:11—88:11 - Irrelevant (Fed.R.Evid. 401-402). It is undisputed that Plaintiff had three violations, two of which were proven, and one of which Plaintiff admitted to. The first violation occurred in early 2000, for which Campbell acknowledged he was responsible. As a result of his admitted misconduct, he was issued a

1 formal letter of reprimand. (Pl. Depo., 119:13-15.) The second incident occurred in January
 2 2002, for which Plaintiff was charged with four serious rules infractions. Amtrak conducted a
 3 formal investigation hearing on March 15, 2002. Based in large part on Plaintiff's own
 4 admissions, a neutral hearing officer assessed him a 20-day suspension, with 10-days held in
 5 abeyance. (Baxter Dec., ¶ 3, Ex. B; Pl. Depo., 120:4—121:7, 123:12—124:1 and Pl. Depo. Ex.
 6 14, submitted with Defendants' moving papers.) The third and final incident leading to his
 7 termination took place on July 24, 2004 when he improperly cut out the brakes on a locomotive.
 8 As part of Amtrak's investigative process, a formal hearing was conducted in September of 2004.
 9 Hearing officer Patrick Gallagher issued a Decision to Campbell which stated in pertinent part
 10 that it was "evident on the record by the testimony of the Corporation's witnesses and your own
 11 testimony that you clearly violated the rules and instructions regarding the movement and
 12 coupling of cars and engines." (Shelton Dec., ¶ 11, Ex. D; Pl. Depo., 154:17—155:4 and Pl.
 13 Depo. Exh. 19, submitted with Defendants' moving papers.)

14 17. Transcript of Deposition of Susan Venturelli, dated March 23, 2007:

15 (a) 116:10—119:8 - Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid.
 16 401-402); assumes facts not in evidence ((Fed.R.Evid. 611(a)); speculation; lacks foundation.

17 (b) Exhibits: Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402);
 18 assumes facts not in evidence ((Fed.R.Evid. 611(a)); speculation; lacks foundation.

19 18. Transcript of Deposition of Donald Bruce Shelton, taken in the case of *Hardeman*
 20 *v. Amtrak et al.*, dated June 28, 2006, U.S. Dist. Court Case No. C 04-3360 SI:

21 (a) Deposition testimony of a witness in another case may not be submitted
 22 to the Court as evidence for consideration in opposition to Defendants' motion for summary
 23 judgment. *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31, 36 (1st Cir. 2005) ("plaintiffs
 24 [opposing Defendants' motion for summary judgment in an employment discrimination case]
 25 made no attempt to specify what 'adjudicable facts' met the requirements of Federal Rule of
 26 Evidence 201. Not only do pleadings, parties, issues, and facts differ in different cases, but
 27 plaintiffs cannot sidestep their neglect to offer evidence in this case by asking the court to rule on
 28 the basis of the record in another case Refusal to take judicial notice was amply justified."

(b) Entire transcript - Irrelevant (Fed.R.Evid. 401-402). Derailments can arise from a number of different situations. In general, a derailment occurs when any portion of a train or car separates from the track. A derailment is not necessarily the result of negligence or misconduct. As detailed above, none of the offenses allegedly committed by others can compare to Plaintiff's July 24, 2004 incident on the most basic level, let alone "in all material respects." Because Plaintiff has failed to demonstrate he is similarly situated in all material respects to the Caucasian employees he claims received more favorable treatment, he has not established a *prima facie* case of discrimination under Title VII or 42 U.S.C. 1981. The Ninth Circuit Court of Appeals has long held that "comparable evidence" necessarily requires that the employees with whom the plaintiff seeks to make a comparison are "similarly situated in *all* material respects." *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 660 (9th Cir. 2002)**Error! Bookmark not defined.** (citing with approval, *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53-54 (2d Cir. 2001) (emphasis added); *Moran v. Selig*, 447 F.3d 748 (9th Cir. 2006)**Error! Bookmark not defined.**, following *Aragon, supra*. See also *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (holding "plaintiff must show that the "comparables" are similarly-situated in all respects"); *Lynn v. Deaconess Med. Center-West Campus*, 160 F.3d 484, 487 (8th Cir. 1998) (requiring employees be "similarly situated in all relevant respects"). In order to qualify as "similarly situated" in all material respects, each person with whom the plaintiff seeks to compare his treatment must have dealt with the same supervisor, must have been subjected to the same standards, and must have engaged in the same conduct as the plaintiff "without any differentiating or mitigating circumstances that would explain distinguish their conduct or the employer's treatment of them for it." *Machado v. Johnson*, 191 Fed. Appx. 531 (9th Cir. 2006).

(c) 36:1—45:5 - Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402); assumes facts not in evidence ((Fed.R.Evid. 611(a)); speculation; lacks foundation.

(d) 49:6-15 -- Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402); speculation; lacks foundation.

(e) Exhibits: Hearsay (Fed.R.Evid. 802); irrelevant (Fed.R.Evid. 401-402); lacks foundation.

19. Transcript of Deposition of Denver Jay Payne, taken in the case of *Hardeman v. Amtrak et al.*, dated April 17, 2006, U.S. Dist. Court Case No. C 04-3360 SI:

(a) Entire transcript - Irrelevant (Fed.R.Evid. 401-402); more prejudicial than probative and confuses the issues (Fed.R.Evid. 403). Deponent was not present at any of the incidents for which Plaintiff was disciplined. The events about which deponent testified concern switching. Splitting switches is not the same as the offense Plaintiff committed (cutting out the brakes during a move). Moreover, Plaintiff either admitted guilt, or was adjudicated responsible, for the three violations that led to his discharge.

(b) Deposition testimony of a witness in another case may not be submitted to the Court as evidence for consideration in opposition to Defendants' motion for summary judgment. *Guzman-Ruiz v. Hernandez-Colon*, 406 F.3d 31, 36 (1st Cir. 2005) ("plaintiffs [opposing Defendants' motion for summary judgment in an employment discrimination case] made no attempt to specify what 'adjudicable facts' met the requirements of Federal Rule of Evidence 201. Not only do pleadings, parties, issues, and facts differ in different cases, but plaintiffs cannot sidestep their neglect to offer evidence in this case by asking the court to rule on the basis of the record in another case Refusal to take judicial notice was amply justified.")

20. Confidential Declaration of Pamela Price in Opposition to Defendants' Joseph Deely and National Railroad Passenger Corporation's Motions for Summary Judgment, or in the Alternative, Partial Summary Judgment:

(a) Confidential Portion of Ray Clarke's deposition, taken April 25, 2007:

(i) Entire transcript - Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid. 802); assumes facts not in evidence ((Fed.R.Evid. 611(a)); speculation; lacks foundation; more prejudicial than probative and confuses the issues (Fed.R.Evid. 403). None of Clarke's violations was comparable to Plaintiff's. *Supplemental Declaration of Steven Shelton*, filed May 8, 2007. The Ninth Circuit Court of Appeals has long held that "comparable evidence"

1 necessarily requires that the employees with whom the plaintiff seeks to make a comparison are
 2 “similarly situated in *all* material respects.” *Aragon v. Republic Silver State Disposal, Inc.*, 292
 3 F.3d 654, 660 (9th Cir. 2002)**Error! Bookmark not defined.** (citing with approval, *McGuinness*
 4 *v. Lincoln Hall*, 263 F.3d 49, 53-54 (2d Cir. 2001) (emphasis added); *Moran v. Selig*, 447 F.3d
 5 748 (9th Cir. 2006)**Error! Bookmark not defined.**, following *Aragon, supra*. See also
 6 *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (holding
 7 “plaintiff must show that the “comparables” are similarly-situated in all respects”)); *Lynn v.*
 8 *Deaconess Med. Center-West Campus*, 160 F.3d 484, 487 (8th Cir. 1998) (requiring employees
 9 be “similarly situated in all relevant respects”). In order to qualify as “similarly situated” in all
 10 material respects, each person with whom the plaintiff seeks to compare his treatment must have
 11 dealt with the same supervisor, must have been subjected to the same standards, and must have
 12 engaged in the same conduct as the plaintiff “without any differentiating or mitigating
 13 circumstances that would explain distinguish their conduct or the employer’s treatment of them
 14 for it.” *Machado v. Johnson*, 191 Fed. Appx. 531 (9th Cir. 2006).

15 (ii) Exhibits: Irrelevant (Fed.R.Evid. 401-402); hearsay (Fed.R.Evid.
 16 802); assumes facts not in evidence ((Fed.R.Evid. 611(a)); speculation; lacks foundation; more
 17 prejudicial than probative and confuses the issues (Fed.R.Evid. 403).

18 Respectfully Submitted,

19 Date: May 15, 2007

JACKSON LEWIS LLP

20
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